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DECISION



21075

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-202662; B-203656 **DATE:** March 10, 1982
MATTER OF: Timberland-McCullough, Inc.

DIGEST:

1. No ambiguity existed between RFP's evaluation criteria and contracting agency's internal procurement regulation so as to justify cancellation of solicitation.
2. Protest is sustained where contracting agency failed to provide justification for why it awarded contract to lower-scored, lower-priced offeror where solicitation's evaluation factors indicated that award would go to highest scored offeror.
3. Claim for proposal preparation costs is denied since it cannot be determined that protester had substantial chance of receiving the award under either the original solicitation or the resolicitation.

Timberland-McCullough, Inc. (Timberland), protests the cancellation of request for proposals (RFP) No. R6-12-81-40, issued by the Siuslaw National Forest, Forest Service, Department of Agriculture, Corvallis, Oregon, and the award of a contract to AA Surveying Service, Inc. (AA Surveying), under RFP No. R6-12-81-77, the resolicitation of RFP -40.

We sustain the protest, but deny Timberland's claim for proposal preparation costs.

The solicitations requested offers for cadastral survey services. Timberland was the highest technically evaluated offeror under RFP -40, but the Forest Service announced that it intended to award the contract to the second highest technically evaluated offeror, AA Surveying, because that firm offered the lowest price. The companies were ranked as follows:

<u>Firm</u>	<u>Price Proposal</u>	<u>Price Points</u>	<u>Technical Points</u>	<u>Total Points</u>
Timberland	\$70,000	135	140	275
AA Surveying	65,931	140	132	272

Timberland protested this decision to the contracting officer, arguing that price and technical factors were supposed to have equal weight under RFP -40 and, under this evaluation scheme, Timberland was in line for the award.

The contracting officer decided to cancel RFP -40 and resolicit because the RFP's "Award of Contract" clause was in conflict with Forest Service Procurement Regulation (FSPR) § 4G-3.805-1(a)(9)(ii) which, in the contracting officer's opinion, requires award to the lowest priced offeror within the competitive range. Timberland protested the decision to cancel to our Office, but also submitted an offer on the resolicitation, RFP -77.

Timberland received the highest technical score under the resolicitation, but the Forest Service awarded the contract, without conducting any negotiations, to AA Surveying as the lowest priced offeror in the competitive range. Although RFP -77's "Award of Contract" clause had been revised to avoid the ambiguity which the contracting officer had found in the clause contained in RFP -40, Timberland again argued that, under the new solicitation, price and technical factors were supposed to have equal weight and, therefore, it was in line for the award. Since the Forest Service refused to accept this interpretation of RFP -77's "Award of Contract" clause, Timberland filed a second protest with our Office.

The key factor in both protests is the Forest Service's interpretation of FSPR § 4G-3.805-1(a)(9)(ii). This regulation provides:

"Whenever the contract is to have a fixed price, price may not be disregarded in selecting a contractor. This is particularly true where more than one acceptable offer from technically qualified sources

remains for consideration after conduct of negotiations. If a lower-priced, lower-scored offer meets the Government's needs, acceptance of a higher-priced, higher-scored offer shall be supported by a written determination by the Board that the technical superiority of the higher-priced offer warrants the additional cost involved in the award of a contract to that offeror."

Both the cancellation of RFP -40 and the decision to award the contract to AA Surveying under RFP -77 were based on the Forest Service's interpretation of this provision: that, regardless of what evaluation factors are contained in the solicitation, if the contract is to have a fixed price, the award has to be made to the lowest priced offeror in the competitive range, even though a higher priced offer may be technically superior. We do not agree with this interpretation. While it is true that the regulation emphasizes price over technical factors, it clearly does not preclude award to a technically superior, higher priced offer. It merely requires a written determination justifying the decision to award to the higher priced offer on the grounds that the technical superiority offsets the additional cost involved.

Therefore, we see no conflict between the regulation and the terms of the solicitation. While we have recognized that an ambiguous RFP can be a basis for cancellation, Infodyne Systems Corp., B-185481, July 12, 1976, 76-2 CPD 33, since the Forest Service's interpretation of the regulation was incorrect, we do not find that an ambiguity existed justifying cancellation of RFP -40.

In view of the above, the Forest Service should have made an award under RFP -40. Timberland argues that because it had the highest total point score that it was therefore entitled to this award. However, the award determination could not have been made merely on that basis. Under the circumstances, the Forest Service could not simply ignore cost. With technical and price factors being weighed equally, the Forest Service was required to determine whether Timberland's offer was so technically superior that this superiority would offset the additional costs that an award to Timberland would involve. Where a fixed-price award is contemplated,

as here, and cost is assigned points as an evaluation factor along with other factors, the fact that a proposal receives the highest number of points does not in itself justify acceptance of the highest scored proposal without regard to price. Automated Systems Corporation, B-184835, February 23, 1976, 76-1 CPD 124, Grey Advertising, Inc; 55 Comp. Gen. 1118 (1976), 76-1 CPD 325.

Thus, as our discussion of FSPR § 46-3,805-1(a)(9)(ii) indicates, for the award to have been made to Timberland, the Forest Service was first required to justify the award to a higher-priced, technical-superior offer. On the other hand, if the Forest Service concluded that Timberland's technical superiority did not offset the additional costs, it could not, in light of the RFP's evaluation factors, make an award to AA Surveying without an explanation justifying its determination. In other words, since the evaluation factors indicated that the award would be made to the offeror with the highest total point score, before the Forest Service could make an award to a lower-scored, lower-priced offeror, it first had to explain the basis for its determination that the difference in technical scores did not justify award to the higher-scored, higher-priced offeror. The University Foundation, California State University, Chico, B-200608, January 30, 1981, 81-1 CPD 54. However, due to its misinterpretation of FSPR § 46-3,805-1(a)(9)(ii), the Forest Service made no determination whatsoever, but simply canceled RFP -40. In light of this, it is not possible at this point to determine which firm was in line for the award under RFP -40.

On the resolicitation, the offerors were ranked as follows:

<u>Firm</u>	<u>Price Proposal</u>	<u>Price Points</u>	<u>Technical Points</u>	<u>Total Points</u>
Timberland	\$64,400.00	131	140	271
AA Surveying	61,330.60	140	125	265

However, the evaluation factors in RFP -77 differed from those set out in RFP -40. In RFP -77, there was

no specific statement that price and technical proposals would be evaluated on an equal basis. Nevertheless, RFP -77 did provide that the maximum score for both technical and price proposals would be 140 points each. The "Award of Contract" clause further stated:

"The numerical scores resulting from evaluation of proposals received will be used as a guide in determining the competitive range.

* * * * *

"Award will be made to that responsible offeror whose proposal deemed technically acceptable and within the competitive range will be the most advantageous to the Government price and other factors considered and may be made without further negotiation. * * *"

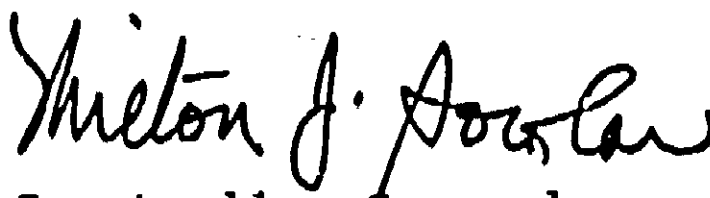
Timberland argues that the changes the Forest Service made in the evaluation factors for RFP -77 were intended to reflect the Forest Service's interpretation of FSPR § 4G-3.805-1(a)(9)(ii)--that the contract had to be awarded to the lowest price offer in the competitive range. In Timberland's opinion, award still had to be made by weighing technical and price proposals equally; the Forest Service could not merely weigh technical and price proposals equally for purposes of determining the competitive range and then award to the lowest offer within the competitive range.

Despite the Forest Service's changes in RFP -77's evaluation factors, our discussion of RFP -40 is still controlling. The use of the term "price and other factors" merely establishes that the source selection official cannot totally disregard price, but also that price alone is not determinative since the reference to other factors includes consideration of the technical acceptability of proposals. A.R. & S. Enterprises, Inc., B-196518, March 12, 1980, 80-1 CPD 193. All the evaluation factors found in RFP -77 indicate that price and technical factors were to have equal weight, thus, in effect, the evaluation scheme for RFP -77, despite the use of the term "price and other factors," is the same as that for

RFP -40. Once again, then the Forest Service had to explain the basis for its award decision whether it decided to award to the offeror with the highest total score (Timberland) or the offeror with the lowest price (AA Surveying). The Forest Service made no such determination. In light of this, the record is unclear as to the basis for selecting AA Surveying over Timberland. The University Foundation, California State University, Chico, supra.

We sustain the protest and, therefore, must determine whether Timberland is entitled to proposal preparation costs as it claims. To recover proposal preparation costs under the situation presented, Timberland must show that, if the agency had acted properly, it had a substantial chance of receiving the award. University Research Corporation, B-186311.2, November 30, 1981, 81-2 CPD 428. As indicated above, because the Forest Service made no determination explaining which of the two firms it intended to award the contract to under RFP -40, it is not possible at this point to conclude that Timberland had a substantial chance of receiving the award under the canceled RFP -40. For the same reason, there is no basis to conclude that Timberland had a substantial chance of receiving the award under RFP -77. On the contrary, although it failed to document the contract file, the Forest Service did in fact award the contract to AA Surveying. Therefore, since it cannot now be determined whether Timberland had a substantial chance of receiving the award under either RFP's Timberland is not entitled to proposal preparation costs. University Research Corporation, supra.

We sustain the protest, but deny the claim.

for 
Comptroller General
of the United States